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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MARCUS G., a Person Coming
Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

OSCAR A.,

Defendant and Appellant.

A125703

(Alameda County
Super. Ct. No. OJ08008844)

OSCAR A.,

Petitioner,

v.

SUPERIOR COURT OF ALAMEDA
COUNTY;

Respondent,

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Real Party in Interest.

A127864

The most fundamental principle of the legal system is due process, and among the most important components of due process are notice of the claim or charge against one,

and the opportunity to defend against it. But even error of this nature is not presumed reversible and can be found harmless. That is what we have here.

Oscar A., the father of minor Marcus G., appeals from the order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26. His sole claim of error is that the termination order is fatally tainted by the fact that he did not receive timely notice of the dependency. In case his appeal fails due to steps not taken by this counsel in the juvenile court, appellant has also filed an original proceeding (A127864) with a petition for a writ of habeas corpus.

We conclude that respondent Alameda County Social Services Agency (Agency) did not provide appellant with notice of the dependency in anything like a timely manner, but that this error does not require reversal of the termination order. We further conclude that the habeas petition should be denied.

BACKGROUND

Much, if not most, of the record need not be summarized because it is not germane to the limited issue of this appeal. Moreover, notwithstanding the lack of notice to him, appellant does not seriously challenge the validity of the dependency. Except for a single sentence in his brief, he does not claim that it was initiated in January 2008 without basis, or that any other error impacting him occurred at any of the myriad hearings preceding the termination order made on July 21, 2009.

To cut to the chase, there is no question that appellant's name was known to the Agency from the beginning of the dependency. In the Detention Report submitted by the Agency on January 14, 2008, three days after the dependency petition was filed, appellant is listed as Marcus's "alleged" father with these details: "The mother stated that the biological father is an ex-boyfriend Oscar [A.], and that the minor was conceived as a result of an act of rape. The mother stated that she does not have contact with Mr. [A.] and he is unaware of the pregnancy He is an alleged father." Johnny S., described as the mother's fiancée, was listed at the presumed father.

This was essentially the state of affairs through August 2008, during which period Marcus was detained for a second time under a supplemental petition; yet another

supplemental petition was filed; and Marcus was continued as a dependent child at the six-month review. It was not until January of 2009—by which time Johnny S. was out of the picture for possible reunification with Marcus—that the Agency case worker advised the court for a status review hearing: “On 1/5/09, the alleged father, Oscar [A.], contacted the undersigned and updated the Agency with his whereabouts. He was advised to seek counsel and to take a paternity test.”

The following events occurred in 2009:

Appellant appeared at the January 12 hearing and told the court: “I am here to see if I am the father of the baby. I am here to see if I could get a paternity test to find out if he is my baby.” The court ordered paternity testing and continued the matter.

By March 30, the Agency was recommending that the court set a .26 hearing at which adoption could be selected as the permanent plan for Marcus. The case worker advised the court that a paternity test had confirmed that appellant was Marcus’s father. However, the case worker also advised the court that the mother continued to insist that “the minor was conceived as a result of forcible rape” by appellant. The court adopted the Agency’s recommendations to terminate reunification services to the mother and to set a .26 hearing for July 21; but the court also stated that “at the next hearing date, [appellant] can file a motion with respect to any issue that needs to be addressed.” Because the whereabouts of Johnny S. were unknown, the court set May 14 for a hearing to review whether the Agency had exercised due diligence in attempting to provide notice to him.

On May 1, counsel for Marcus moved the juvenile court, pursuant to Welfare and Institutions Code section 388, to modify an order made on February 20 designating appellant the child’s presumed father, changing it to “the biological father of the child.” One of the reasons for the motion was that appellant “has not participated in the child’s life and the child does not have a relationship with Mr. [A.]” The court ordered that this motion would be heard at the May 14 hearing already scheduled, as would the request of Marcus’s foster parent to be declared his de facto parent.

On May 14, appellant also filed a motion requesting that the court modify a previous order. Specifically, appellant asked for change of the orders denying him reunification services and setting the .26 hearing. The grounds for the requested change were given as follows: “There is testimonial evidence . . . showing that father did not rape mother, but instead had a 10-week relationship with her. In addition, father held her out to the community and his extended family as his ‘girlfriend’; mother did not refute during past interactions. There is no testimonial or documented proof of criminal charges or convictions against the father supporting allegations of rape.” Counsel for Marcus opposed appellant’s motion on the ground that he qualified as nothing more than “ ‘a mere biological father’ because he has done nothing to develop a relationship with his biological child.”

That same day, May 14, the Agency filed a statement under penalty of perjury by a “search clerk” enumerating the 14 steps taken—without success—to locate Johnny S. Later that same month, on May 21, the Agency submitted a similar statement detailing the 16 unsuccessful efforts made to locate the mother.

At the May 14 hearing, the court vacated its finding that appellant was the presumed father, replacing it with a determination that appellant was Marcus’s biological father. The court found that the Agency had exercised due diligence in attempting to locate Johnny S., and that no further efforts would be required. The court and granted de facto parent status to the foster parent who had cared for Marcus for virtually the entirety of the dependency.

The court also denied appellant’s motion as follows: “[T]he Court will make sure that the record reflects that reunification cannot be reinstated or maintained as to Mr. [A.]. It is almost 18 months since Marcus was removed, and there is no way based on the record before this court that Marcus can be placed with his biological father even if Mr. [A.], the biological father, was designated the presumed father and he is not the presumed father. [¶] . . . [¶] Also, I want to make sure that the record reflects that the biological father can be denied presumed father status if he has not sufficiently

demonstrated a full commitment to his parental responsibility. This record does show that there has been no sufficient or timely demonstration.”

In its “366.26 WIC Report” the Agency advised the court that an assessment had been made of Marcus’s situation, and it was concluded that he was adoptable. The de facto parent was willing to adopt.

The termination hearing held on July 21 was brief. All parties, including appellant, submitted the issue on the Agency’s “366.26 WIC Report,” and there was no argument. The court then terminated appellant’s parental rights, as well as those of the mother and Johnny S., and accepted the Agency’s recommendation of adoption as Marcus’s permanent plan.

Appellant filed a timely notice of appeal on August 4, 2009. After briefing on the appeal was completed, appellant filed a petition for a writ of habeas corpus or mandate. We issued an order that the appeal and the petition would be considered together.

DISCUSSION

General Principles

In general, the rights to which a father is entitled in a dependency depend upon his status. The dependency statutes distinguish among three categories: (1) presumed; (2) biological, or natural; and (3) alleged. (See *In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.)

The Family Code sets forth the criteria for determining presumed father status. As relevant here, there are three: a man marries or attempts to marry the child’s mother; he and the mother execute a voluntary declaration of paternity; or he receives the child into his home and openly holds out the child as his. (Fam. Code, §§ 7571, 7573, 7611, subds. (a)-(d).) A biological father is one whose paternity of the child has been established, but who has not established that he qualifies as the child’s presumed father. An alleged father is a man who may be the father of the child, but who has not established biological paternity or presumed father status. (*In re Zacharia D.*, *supra*, at pp. 449, fn. 15, 451; *In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.)

“Presumed father status ranks highest.” (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) “[O]nly a presumed, not a mere biological father is ‘a parent’ entitled to receive reunification services under section 361.5’ ” or to seek custody of the child under section 361.2. (*In re Zacharia D., supra*, 6 Cal.4th 435, 451.) “Biological fatherhood does not, in and of itself, qualify a man for presumed father status under [Family Code] section 7611. On the contrary, presumed father status is based on the familial relationship between the man and the child, rather than any biological connection.” (*In re J.L., supra*, 159 Cal.App.4th 1010, 1018.)

The due process to which any parent in a dependency proceeding is entitled is “ ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ ” (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418, quoting *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314; accord, *In re Claudia S.* (2005) 131 Cal.App.4th 236, 247; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 106.) “Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations], the state, before depriving a parent of that interest, must afford him adequate notice and an opportunity to be heard.” (*In re B.G.* (1974) 11 Cal.3d 679, 688-689.) Notice must be provided to “[t]he father,” whether “presumed [or] alleged.” (Welf. & Inst. Code, § 291, subd. (a)(2); see *In re O.S.* (2002) 102 Cal.App.4th 1402, 1408; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.) It is required at each stage of the proceedings leading to terminating a parent’s rights. (*In re J.H.* (2007) 158 Cal.App.4th 174, 182; *In re DeJohn B., supra*, at p. 106; *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1019.)

But “[t]he right to be heard ‘ ‘has little reality or worth unless one is informed that the matter is pending . . . ’ ” ’ ” (*County of Orange v. Carl D.* (1999) 76 Cal.App.4th 429, 439; accord, *In re O.S., supra*, 102 Cal.App.4th 1402, 1408.) “The child welfare agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith.” (*In*

re Justice P. (2004) 123 Cal.App.4th 181, 188; accord, *In re J.H.*, *supra*, 158 Cal.App.4th 174, 182; *In re Claudia S.*, *supra*, 131 Cal.App.4th 236, 247-248.) “Social service agencies, invested with a public trust and acting as temporary custodians of dependent minors, are bound by law to make every reasonable effort in attempting to inform parents of all hearings. They must leave no stone unturned.” (*In re DeJohn B.*, *supra*, 84 Cal.App.4th 100, 102.) The Agency’s performance—or more accurately, its non-performance—does not measure up. Apparently realizing that its efforts could well be found deficient, the Agency raises several reasons in the hope that conclusion can be avoided—reasons that are unpersuasive.

The Agency’s Arguments Against Reaching The Merits Are Not Persuasive

“An alleged father in dependency or permanency proceedings does not have a known current interest [in the proceeding] because his paternity has not yet been established.” (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1352.) This is the basis for the Agency’s contention that appellant lacks standing to overturn the termination order.

However, as shown, an alleged father is entitled to notice of the dependency proceedings so that he may have an opportunity to establish paternity and thus ascend to presumed father status. (*In re Alyssa F.* (2003) 112 Cal.App.4th 846, 855.) Appellant’s claim is based upon this limited exception. Moreover, the view that an alleged father cannot appeal from a termination order is not monolithic. There is well-reasoned authority to the contrary. (See *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1116-1117; *In re Paul H.* (2003) 111 Cal.App.4th 753, 759.)

The Agency next argues we need not reach the merits of appellant’s constitutional claim because he never objected in the trial court about the Agency’s lack of diligence in locating him before he showed up in January 2009. The general rule is that the failure of a parent to raise an issue before the juvenile court forfeits the issue for appellate review. (E.g., *In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) However, the rule is not inflexible, although considerable caution should be used in allowing exceptions. “Because [dependency] proceedings involve the well-being

of children, considerations such as permanency and stability are of paramount importance.” (*In re S.B., supra*, at p. 1293.) The Agency also submits the issue is doubly forfeited because appellant could have, but did not, raise the matter by appealing from the May 14 order denying his motion under Welfare and Institutions Code section 388.

The Agency makes a solid case for applying the forfeiture principle here, and we are certainly aware of Marcus’s interest in a stable environment. However, given the most fundamental nature of appellant’s claim, and the fact that the issue could hardly be evaded on his habeas petition based on these omissions by his trial counsel, we choose to address that claim on its merits

**Reversal of the Termination Order is Not Required Because
Although Appellant Did Not Receive Timely Notice Of The Pending
Dependency He Is Unable To Demonstrate Prejudice**

We agree with appellant that he did not receive timely notice of Marcus’s dependency, and that this omission was attributable to the Agency not exercising anything approaching due diligence in order to locate him.

Initially, we must confess an utter incomprehension of the Agency’s argument that somehow it was all appellant’s fault. The Agency tells us in its brief: “He did not explain how he came to know about the existence of the dependency proceeding. He did not explain how he came to know to contact the CWW [Child Welfare Worker] assigned to the case. He did not explain why he waited until January 2009 to call the CWW. He did not say whether he was transient before his move to West Oakland. He did not claim the Agency knew his previous whereabouts, or had ways of finding that information. . . . There is nothing on [*sic*] the record to show when and how he learned about the dependency proceeding, when and how he learned the identity and contact information for the CWW, whether and when he received any notice from the Agency regarding the proceeding, his whereabouts before his ‘recent’ move to West Oakland, whether he was transient before his move to West Oakland, whether he claims the Agency could have located him, and why he waited until 1/5/2009 to contact the CWW.”

This is an egregious example of blaming the victim. As shown above, it was the Agency's obligation to locate appellant, not appellant's duty to report to the Agency. And the ineluctable reality—however much the Agency might like to spin it—is that the Agency failed that obligation for an entire year, despite knowing of appellant's existence and his possible parentage. In fact, had it not been for appellant contacting the Agency, there is no reason to believe that the Agency would ever have managed to find appellant and acquaint him with the on-going dependency. The Agency's abysmal nonfeasance is thrown into even starker relief when compared with the efforts it made to locate the mother and Johnny S.

Nevertheless, the Agency's inexcusable inaction—which, as already noted, it makes no real effort to defend—will not require reversal. When he first appeared on the scene, appellant was naturally puzzled, because the mother had told him she had terminated the pregnancy. Once he adjusted to this idea, he was understandably concerned to settle the issue of Marcus's paternity. Once that was proven, he was then concerned with disproving the mother's claim that his paternity was the consequence of a rape.

In his brief, appellant states: "Had the Agency used due diligence at the beginning of the dependency proceedings, appellant would have been notified in time to appear, to establish his paternity, and to request custody without dependency jurisdiction, or request family maintenance or family reunification services, or seek relative placement." He argues that he "could have and would have asserted" his "parental rights . . . from the beginning of the case" had he been notified in a timely manner. But the record does not sustain this optimism.

When, on May 14, 2009, in an apparent response to the juvenile court's virtual invitation for him to "file a motion with respect to any issue that needs to be addressed," appellant did file a motion requesting reunification services. But the real premise of the motion was appellant's erroneous belief that he had qualified as a presumed father, and his heated insistence that there was no rape. This was five months after he introduced himself to his son's dependency, and after his paternity seems to have been accepted by

all parties. Yet conspicuously absent is any expression of parental concern or affection. There is nothing touching upon appellant's plans for bonding with the child, his ability to support Marcus, or any desire to have him placed with a relative. Thus, it appears almost certain that it was this approach, unconcerned with Marcus's situation, but very much concerned with refuting any improper aspersion upon himself, which prompted the juvenile court to find that appellant "has not sufficiently demonstrated a full [or timely] commitment to his parental responsibility." The court made this finding at the same time the de facto parent was advising it that appellant "has not participated in the child's life" and the case worker was informing the court that appellant "has not visited with the minor." In neither of the two reports submitted by the Agency between the May 14 hearing and the July 21 termination hearing is there an expression by appellant of any hopes, plans, or abilities to assume the care of his son. Likewise, there is also no mention of a relative with whom Marcus might be placed. Indeed, even in the declaration attached to his habeas corpus petition, appellant can go further than to state that he told his appointed trial counsel that "I wanted custody of my son and that my family was available to help me or to care for my son if necessary. My brother and sister also live in Oakland with their families and they were supportive of me." In light of the record, we are compelled to agree with the Agency when it states in its brief: "Despite his many opportunities, the record does not show that [appellant] has ever expressed any interest in requesting placement or relative placement throughout the many hearings he attended. The appropriateness of placement with him or some relative was simply never an issue."

Without in any sense wishing to absolve the Agency for its deplorable non-performance, we conclude that there was virtually no chance that the juvenile court was going to remove Marcus from the custody of his long-term caregiver, who showed every likelihood of becoming his adoptive parent. The Agency's conduct thus qualifies as harmless beyond a reasonable doubt. (See, e.g., *In re Angela C.* (2002) 99 Cal.App.4th 389, 394-396.)

DISPOSITION

In A125073, the order terminating the parental rights of Oscar A. is affirmed. In A127864, the petition for a writ of habeas corpus is denied.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.